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No. 90-276

In The

Supreme Court of the United States

October Term, 1990

ELISA COSGROVE

Petitioner,

v.

KANSAS DEPARTMENT OF
SOCIAL AND REHABILITATION SERVICES

Respondent.

and

IN THE INTEREST OF L.C. AND C.C.
CHILDREN UNDER THE AGE OF 18 YEARS

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTION PRESENTED FOR REVIEW

I. DOES FEDERAL LAW REQUIRE THE KANSAS HABEAS CORPUS ACT, K.S.A. 60-1501, et seq. TO PROVIDE POST APPELLATE REVIEW OF CIVIL ACTIONS WHICH SEVER PARENTAL RIGHTS?

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No. 90-276

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October Term, 1990

ELISA COSGROVE

Petitioner,

v.

KANSAS STATE DEPARTMENT OF
SOCIAL AND REHABILITATION SERVICES

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT OF THE CASE

Lori C. and Charles C. Jr. are minors. In 1986 the Johnson County District Court found them to be children in need of care pursuant to K.S.A. 38-1583. This finding arose from the fact that they were terribly abused by the petitioner, their natural mother, and her husband, their natural father. The parental rights of petitioner and her husband were permanently severed. *In the Interest of Lori C. and Charles C., Jr., each a Child Under 18 years of Age,* Johnson County Case Nos. 86 JC 0555, 86 JC 0556 and 894 JC 0290.

On July 8, 1988 the Kansas Court of Appeals affirmed the district court. *In the Interest of Lori C. and Charles C., each a Child Under 18 years of Age,* Case No. 60-346, Ap-

pendix "A". The Kansas Supreme Court denied the petition for review. *In re Lori C.*, 243 Kan. 778 (1988).

All of the events complained of by petitioner occurred prior to 1987 and could have been raised in the original severance hearing and/or its appeal.

On December 13, 1988 petitioner filed a complaint in the United States District Court seeking to regain custody of Lori C. and Charles C., Jr. In response to a motion to dismiss petitioner dismissed her complaint. *Cosgrove v. Hayden, et al.*, No. 88-2608-S (D.Kan. March 3, 1989).

On February 9, 1989 petitioner filed suit in the Johnson County District Court seeking to regain custody of Lori C. and Charles C., Jr. under the Kansas Habeas Corpus Act, K.S.A. 60-1501, et seq. The district court dismissed the action on the grounds that under state law the petitioner had no standing; that res judicata barred relitigation of the custody dispute; and that the Act does not provide for post appellate review of a civil action based on ineffective assistance of counsel. *Cosgrove v. SRS*, Johnson County Case No. 89-C-1527 (May 9, 1989).

On July 19, 1989 the Johnson County District Court refused to reopen the original custody case. *In the Interest of Lori C. and Charles C., Jr., supra.*

The February and June district court were affirmed by the Kansas Court of Appeals. *Cosgrove v. SRS*, 14 Kan.App.2d 217, ___ P.2d ___, *review denied*, April 24, 1990.

The details of the original child abuse and custody case are protected from public view by K.S.A. 1989 Supp. 38-1506. In the hope that Lori and Charles may continue to recover from the abuse visited upon them, respondent will not at this time go into the details of the case. However, respondent will state that petitioner is an unfit parent.

Further, she received a fair trial in front of a fair and unbiased judge.

REASON WHY THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE KANSAS COURT OF APPEALS DOES NOT CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT, ANY UNITED STATES COURT OF APPEALS, OR THE UNITED STATES SUPREME COURT.

If petitioner had valid concerns regarding the state court system's process by which her parental rights were severed, she should have petitioned this Court within the ninety days of the conclusion of the original state appellate case in 1988. *In re Lori C., supra.* She chose not to appeal the original action. She can not now resurrect that case by means of *Habeas Corpus.* This is not a proper 28 U.S. 1257 appeal.

Habeas corpus does not provide post appellate relief in state parental severance proceedings under either Kansas or federal law. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979); *Lehman v. Lycoming County Children's Services,* 458 U.S. 502, 511, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982).

There is no requirement for the state to provide post appellate review of parental severance cases. Since 1986 over a dozen Kansas judges, trial and appellate, have examined the issues raised by petitioner. Not one has held that petitioner should regain custody of Lori and Charles.

It is time to end this case. The children's lives have been disrupted enough. They need a permanent home with fit parents.

CONCLUSION

This petitioner should be denied. It is untimely and does not properly raise any federal law questions.

Respectfully submitted,

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NOT DESIGNATED FOR PUBLICATION

No. 60,346

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of Lori C. and Charles C.,
Each a Child under 18 Years of Age.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS C. OWENS, judge pro tem. Opinion filed July 8, 1988. Affirmed.

David K. Fromme, of Shawnee, for appellant mother.

Richard G. Guinn, assistant district attorney, *Dennis W. Moore*, district attorney, *Robert T. Stephan*, attorney general.

Before REES, P.J., WILLIAM D. CLEMENT, District Judge, assigned, and FREDERICK WOLESLAGEL, District Judge Retired, assigned.

Per Curiam: E. C., the natural mother of Lori C. and Charles C. Jr., appeals from the trial court's termination of her parental rights. The natural father, C. C. Sr., filed a timely notice of appeal but failed to docket the appeal. His appeal is therefore deemed abandoned. Supreme Court Rule 5.051 (1987 Kan. Ct. R. Annot. 22).

The core contention asserted in this appeal is that, as a matter of law, the evidence before the trial court when it ordered severance was insufficient to meet the statutory requirement that there be "clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for [the] child and the conduct or condition is unlikely to change in the foreseeable future." (K.S.A. 38-1583[a].)

E. C. complains that the trial court's finding of parental unfitness is not supported by substantial competent evi-

dence of clear and convincing quality. She asserts that the trial judge focused on evidence regarding her past actions rather than her conduct and the conditions present at the time of severance.

When called upon to adjudicate a parental severance request, a trial judge bears an awesome burden of evaluation and prognostication. In the performance of his or her responsibility, it is unrealistic and unfair to the parent and the trial judge to restrict the trial judge to "freeze frame" consideration of the evidence. To avoid speculation in its purest form, the trial judge must be allowed to found his or her evaluation and prognostication upon the parent's "track record" while keeping in mind the particular needs of the child. Whether staleness, infrequency of repetition, or nonrepetition causes past acts of parental misconduct to be of diminished or of no value as indicators of present ability and future conduct necessarily must be for evaluation by the factfinder, the trial judge. We can reverse the trial judge's decisions in cases of the sort before us only if we are persuaded and conclude that there is no evidence that the trial judge could have found which was clear and convincing evidence that the parent is presently unfit and is likely to remain unfit in the foreseeable future.

K.S.A. 38-1583 lists factors to be considered by the trial court in making a determination as to severance. Any one of the factors, standing alone, may establish grounds for the termination. K.S.A. 38-1583(e). The trial court considered the majority of factors relevant in the present case and made findings with regard to each factor. Testimony from Lori C., Charles C. Jr., and numerous professionals supports the trial court's finding that E. C. had engaged in acts inimical to an acceptable parental relationship and had participated "in a peripheral manner" in unacceptable parental conduct by C. C. Sr. There was an abundance of testimony that Lori C. displayed multiple personality dis-

order, and of Charles C. Jr.'s obsession with violent behavior and emotional maladjustment. The trial court also found an "aura of ongoing emotional instability" on the part of both parents in light of their conduct toward the children.

E. C. cites *In re Reed*, 8 Kan. App. 2d 602, 663 P.2d 675 (1983), in support of her contention that the severance was based on her past actions rather than her conduct and the conditions present at the time of severance. In *Reed*, the children were found to be "deprived" (children in need of care) and were placed in SRS custody. At the hearing following a request for termination of parental rights one year later, no admissible evidence addressed parental fitness or established the condition in the home in the one year period between the trial court's child in need of care determination and the severance hearing. The *Reed* court consequently found that there was no substantial competent evidence to support termination of parental rights. Unlike *Reed*, however, the present case is replete with testimony from numerous professionals who observed, evaluated, and worked with E. C. and the children during the period of time between the child in need of care hearing and the severance hearing. During this time, the children exhibited ongoing emotional problems, which the professionals attributed to parental misconduct and the family environment, and reacted adversely following visits with E. C. E. C. continued to deny that any misconduct occurred and chose to work with a therapist who thought E. C. had no problems once E. C. separated from C. C. Sr. The therapist refused to set treatment goals. There was testimony that this was not in compliance with SRS's social agreement which required that E. C. show "durable changes in the counseling situation."

We are unable to conclude that the trial court lacked substantial competent evidence of a clear and convincing

quality to support termination of parental rights. (See *In re J. G.*, 12 Kan. App. 2d 44, 51, 734 P.2d 1195, *rev. denied* 241 Kan. ___ [1987].)

E. C. further argues that she was denied a meaningful independent evaluation of the children by a professional of her choosing and that she was substantially prejudiced as a result. She states that, when the severance petitions were filed in May 1986, both parents orally requested an independent evaluation of the children by a professional of their choosing, but the court denied their request. The only evaluation request documented in the record on appeal is C. C. Sr.'s written motion filed September 25, 1986. That motion was set for hearing on September 29, 1986, and was granted by the trial court.

In the absence of some showing of record that E. C. requested and was denied an independent evaluation, we are unable to address the issue on appeal. "The burden is upon the appellant to designate a record sufficient to present its points to the appellate court and to establish the claimed error. *State ex rel. Ludwick v. Bryant*, 237 Kan. 47, Syl. ¶ 6, 697 P.2d 858 (1985)." *Johnson v. Baker*, 11 Kan. App. 2d 274, 277, 719 P.2d 752 (1986).

E. C. next contends that the trial court erred in admitting testimony from Dr. Joe Weaver regarding statements Lori C. made while under hypnosis. The trial court admitted the challenged testimony on the ground that it was not offered to prove the truth of what Lori C. said under hypnosis, but rather to show how Dr. Weaver arrived at his conclusions.

There is no indication that the trial court considered Dr. Weaver's testimony for any purpose other than the limited purpose for which it was admitted, that is, to show how Dr. Weaver arrived at his diagnostic conclusion that Lori C. suffered multiple personality disorder. In light of the testimony of Dr. Bill Graham and social worker Janet

Banker, E. C. has not shown that she was prejudiced by the admission of Dr. Weaver's testimony and any error would be harmless error. "Harmless error is error which does not prejudice the substantial rights of a party. It affords no basis for a reversal of a judgment and must be disregarded." *Hagedorn v. Stormont-Vail Regional Med. Center*, 238 Kan. 691, 701, 715 P.2d 2 (1986).

E. C. finally contends that the administrative judge erred in failing to order recusal of the judge pro tem who conducted the termination hearing. The natural father submitted and filed an affidavit pursuant to K.S.A. 1987 Supp. 20-311d, requesting recusal of the judge. At the hearing on the father's affidavit, counsel for E. C. stated that she did not join in the affidavit. E. C.'s contention on appeal that the judge pro tem should have been recused is inconsistent with her position in the trial court. "A party cannot on appeal be permitted to change its theory or raise new issues not previously presented to the trial court, or inconsistent with the position taken before the trial court. [Citation omitted.]" *Baugher v. Hartford Fire Ins. Co.*, 214 Kan. 891, 901, 522 P.2d 401 (1974). E. C.'s express refusal to join in C. C. Sr.'s affidavit precludes her claim of error on appeal.

In this case, which obviously is painful for all concerned, we are unable to conclude that there is no evidence that the trial judge could have found which was clear and convincing evidence that E. C. was presently unfit and was likely to remain unfit in the foreseeable future. The case has been well and thoroughly presented and considered at both the trial and appellate levels. As counsel are aware, it has not been our role to retry it.

Affirmed.